MASTER AND SERVANT—WHEN EMPLOYEES ARE TO BE CONSIDERED PASSENGERS.—Plaintiff, who was employed by defendant railroad company to labor by the day in its power house, was furnished with a free pass under a rule of the company, which entitled him to ride on any of the company's cars at any time and about his own business. While riding on one of the company's cars between his home and his place of employment, he was killed because of the negligence of the motorman running the car. *Held,* that he was a passenger and not a fellow servant, and recovery allowed. *Harris* v. *City & Elm Grove R. Co.* (W. Va. 1911) 70 S. E. 859.

This case would seem to be in conflict with *Sanderson* v. *Panther Lumber Co.,* 50 W. Va. 42, 40 S. E. 368, 88 Am. St. Rep. 841. In the latter case the plaintiff was the foreman of a lumber camp and was injured while riding on a log train between the camp and the mill, during working hours. The court refused recovery on the ground that he was a fellow servant. The cases are distinguishable, for in the principal case the plaintiff was not at the time of his death traveling in the interest of his employer, and it was after working hours, while in the *Sanderson* case the plaintiff was engaged directly in the master's business. It is well settled that where the employee is riding in the discharge of duties he owes to his employer, he is a fellow servant, and not a passenger. *O'Brien* v. *Boston &c. R. Co.,* 138 Mass. 387, 52 Am. Rep. 279; *Howland* v. *Milwaukee & W. R. Co.,* 54 Wis. 226; *Chicago & A. R. Co.* v. *Keefe,* 47 Ill. 108. The decisions are in conflict as to the right of recovery of an employee riding gratuitously between his home and place of work, either before or after working hours. Some courts in accord with the principal case, hold him to be a passenger and allow recovery. *O'Donnel* v. *Allegheny R. Co.,* 59 Pa. St. 239, 98 Am. Dec. 336; *McNulty* v. *Penn. R. Co.,* 182 Pa. St. 479, 61 Am. St. Rep. 721; *Doyle* v. *Fitchburg R. Co.,* 162 Mass. 66, 25 L. R. A. 157; *Dickinson* v. *West End St. R. Co.,* 177 Mass. 365, 59 N. E. 60, 83 Am. St. Rep. 284; *Peterson* v. *Seattle Traction Co.,* 23 Wash 615, 63 Pac. 539, 53 L. R. A. 586. The leading cases which deny recovery, on the ground that he is a fellow servant and thus assumes the risk of his co-employees' negligence are: *Vick* v. *N. Y., C. & H. R. R. Co.,* 95 N. Y. 267, 47 Am. Rep. 36; *Ionnone* v. *N. Y., N. H. & H. R. Co.,* 21 R. I. 452, 46 L. R. A. 730; *Seaver* v. *R. Co.,* 14 Gray 466; *Gilshannon* v. *Stony Brook R. Corp.,* 10 Cush. 229; *McGuirk* v. *Shattuck,* 160 Mass. 45, 39 Am. St. Rep. 454. If reconcilable at all, these cases seem to rest upon the principle that, where the consideration for free transportation is a reduction of wages, the defense of common employment is not available, but where it is a mere "permissive privilege," the fellow servant rule will be applied. 2 LABATT, MASTER & SERVANT, 1832. Practically all the cases agree upon one principle, and that is, that if the plaintiff is not at the time of the accident engaged in the actual service of the company, or is not in some way connected with such service, but is being carried merely for his own convenience, pleasure, or business, he is a passenger. *Bowles* v. *Indiana R. Co.,* 27 Ind. App. 672, 62 N. E. 94, 87 Am. St. Rep. 279; *Illinois Cent. R. Co.* v. *Leiner,* 202 Ill. 624, 67 N. E. 398, 95 Am. St. Rep. 266; *State* v. *Western Md. R. Co.,* 63 Md. 433. "One may be both a passenger and an employee of a railroad company, an employee, when pass-

ing over the road at a time when actually engaged in performing duties for the company, but a passenger while not so engaged but riding from one place to another, even though continuing all the while in a popular sense in the employment of the company." 5 AM. & ENG. ENCY. LAW 510 and cases cited.

MUNICIPAL CORPORATIONS—CITY ORDINANCES—STATE LAW—SALE OF MILK. —Prior to 1909, there had been in effect in the city of St. Louis an ordinance requiring that all milk sold within the city should contain not less than 8.5 per cent. of non-fatty solids. In 1909, the General Assembly enacted a law requiring milk sold within the state to contain not less than 8.75 per cent. of such solids. After the passage of this act, defendant was convicted under the municipal ordinance of having offered for sale milk containing less than 8.5 per cent. of non-fatty solids. The case was brought to the Supreme Court of Missouri for the determination of the sole question whether such ordinance had become invalidated by the subsequent law. *Held,* the ordinance and the statute were not inconsistent with each other, and the passage of the latter did not affect the validity of the former. Both continued in force, and the conviction under the ordinance was sustained. *City of St. Louis* v. *Scheer* (Mo. 1911) 139 S. W. 434.

The major portion of the opinion relates to the repeal of a municipal ordinance by a state statute covering the same ground. The general rule is followed as laid down in 21 AM. & ENG. ENCY. LAW, Ed. 2, 1002. "The passage of a state law upon a certain subject does not abrogate pre-existing ordinances of municipalities upon the same subject unless they are inconsistent with the statute." *State* v. *Labatut,* 39 La. Ann. 513; *New York* v. *Hyatt,* 3 E. D. Smith, 156. See also 28 CYC. 387, and note. Contra, *State* v. *Langston,* 88 N. C. 692; *Strauss* v. *City of Waycross,* 97 Ga. 475, 25 S. E. 329. The court decline to discuss the matter of the consistency of the two enactments, but acknowledge themselves bound by their decisions in *St. Louis* v. *Klausmeier,* 213 Mo. 119, 112 S. W. 516, and *City of St. Louis* v. *Ameln* (Mo. 1911) 139 S. W. 429. The validity of the ordinance was further attacked as being contrary to the public policy of the state as expressed by the legislative decree. The court's answer to this argument does not carry a great deal of conviction with it. It is in substance this: By maintaining the ordinance in effect, the city does not invite a violation of the statute. It merely says that it will use its officers and courts to enforce the statute only up to the limit of its own ordinance, and if the state desires to do more, it can do so by its own proper officials. This would seem to be a rather strange doctrine to be sanctioned by so high authority. It is denominated by counsel as "shocking" and "paralyzing." In a similar situation, the California Supreme Court held that if a city ordinance allows milk to be sold which contains a less per cent of fats than that exacted by the state law, there would be presented a plain case of conflict between the two such as would render the ordinance void The municipality would be attempting to declare legal what the state had declared unlawful. *Ex parte Hoffman,* 155 Cal. 114, 99 Pac. 517. The question upon which cases of this kind usually turn, namely that of jurisdiction, is only hinted at and but superficially discussed in the principal case. The statute in